No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Wayne R. Glock, Et Al.,
Respondents.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

G. A. McDowell, Et Al.,
Respondents.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Claude C. Johnson,
Respondent.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Robert E. Johnson,
Respondent.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

H. F. Garton,
Respondent.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Dean Williams, Et Al.,
Respondents.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

R. R. Calvert, Et Al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THOMAS D. SHUMATE,
SHUMATE & SHUMATE,

M. A. ROMADY,

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XI. Have the respondents been damaged by reason of the quality of the gas when it is shown in the record without contradiction that this gas is much more valuable than 15 cents per 1,000 cubic feet for the purposes for which it is being used, to repressure a large oil field in order to cause greater production of oil? 26

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IN THE

Supreme Court of the United States

October Term, 1960

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

WAYNE R. GLOCK, ET AL., - - *Respondents.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

G. A. MCDOWELL, ET AL., - - *Respondents.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

CLAUDE C. JOHNSON, - - - - *Respondent.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

ROBERT E. JOHNSON, - - - - *Respondent.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

H. F. GARTON, - - - - - *Respondent.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

DEAN WILLIAMS, ET AL., - - - *Respondents.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

R. R. CALVERT, ET AL., - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A. H. Carpenter and Margaret L. Carpenter pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered on January 13, 1961, in the proceedings entitled as follows: A. H. Carpenter, *et al.* v. Wayne R. Glock, *et al.;* A. H. Carpenter, *et al.* v. G. A. McDowell, *et al.;* A. H. Carpenter, *et al. v.* Claude C. Johnson; A. H. Carptenter, *et al.* v. Robert E. Johnson; A. H. Carpenter, *et al.* v. H. F. Garton; A. H. Carpenter, *et al.* v. Dean Williams, *et al.;* and A. H. Carpenter, *et al.* v. R. R. Calvert, *et al.*

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is printed as Appendix A hereto. It has not been officially reported.

The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing, dated March 10, 1961, and the order of said court denying the supplemental petition for rehearing, dated March 13, 1961, are printed as Appendix B hereto.

The opinion of the United States District Court for the Eastern District of Kentucky, dated January 6, 1960, is printed as Appendix C hereto. It is officially reported in 184 F. Supp. 829.

The opinion in the companion case of Terrill v. Carpenter is printed as Appendix E hereto, and is officially reported in 143 F. Supp. 747, 249 F. 2d 142. (Mr. Justice Potter Stewart sat in this case with Judges Allen and McAllister.)

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 13, 1961. The order of said court denying the petition for rehearing was entered on March 10, 1961, and the order of said court denying the supplemental petition for rehearing was entered on March 13, 1961. The order of said court staying the issuance of mandate for 30 days for time to make petition for writ of certiorari was entered on March 22, 1961.

The aggregate amount of the judgments, interest, penalty and costs against the petitioner, A. H. Carpenter, is approximately $120,000.00.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c) and the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

I. Can the respondents recover the purchase prices paid for interests in oil and gas leases in actions of fraud, proving only the amounts so paid as the measure of damages, as common law actions, and also be permitted to retain the valuable interests so purchased, under the laws of the Commonwealth of Kentucky?

II. Can respondents recover at common law in Kentucky on contracts induced by fraud where the success or failure of the investments depend on future events, and when after full knowledge of the facts alleged, they ratified the contracts by selling the gas produced and receiving the proceeds therefrom?

III. Can the respondents recover against the petitioners when they, after learning of the true analysis of the gas, have executed sale orders to sell the gas and have continued to sell the gas and are now doing so?

IV. Were the rights of A. H. Carpenter violated under the provisions of the Constitution of the United States and particularly the Fifth Amendment thereof by permitting the respondents to retain the valuable properties he sold them and to recover from him the full purchase prices paid?

V. Since Dr. G. A. McDowell signed the same release that was signed by Dr. R. W. Terrill on the 15th day of April, 1951, long after he knew the true analysis of the gas, are his actions herein barred against the petitioners as held in the case of Terrill *v.* Carpenter, 143 F. Supp. 747, 249 F. 2d 142, and the cases therein referred to, when he testified to no facts in avoidance of the release?

VI. Dr. H. F. Garton plead an unconditional release after full knowledge of all of the facts and in avoidance of it, and the petitioners likewise alleged the release, and no evidence was introduced in avoidance of the release, and recovery was permitted by him; and why are his actions not barred by the pleadings?

VII. The Statute of Limitations of Kentucky is fully dealt with in the companion case of Terrill v. Carpenter aforesaid, and why was not the Statute of Limitations which was plead in all of these actions applied in these cases as was applied in the Terrill case?

VIII. The discovery well was on the Garrett farm. The four producing gas wells in which respondents invested are located on the properties adjacent to the Garrett farm and are known as the Smyth, Wise, Wasson and Nicholas farms. Dry wells were drilled on the Wells and Hall leases approximately seven miles from the producing wells. The Hall and Wells leases are shown to be north of the Irvine-Pitcairn fault line, and the geological formations are shown not to be the same as the four producing properties, and there is no evidence of any representations concerning the Hall and Wells properties. By what legal authority did the court refund the monies to respondents paid for interests in the Hall and Wells properties?

IX. Since the only grounds alleged for recovery in these cases is the quality of the gas as containing approximately 42 per cent carbon dioxide and some sulphur, and it is shown that the market value of gas at the well head without such content was 15 cents per 1,000 British Thermal Units per 1,000 cubic feet, and the B. T. U. content of the gas was reduced by reason of the CO_2 content and sulphur, and the respondents appointed H. R. Witt their agent to sell the gas on a B. T. U. content basis, which is being sold by them at 9.39 cents per 1,000 cubic feet, why would not the

respondents be limited to recover the difference between 9.39 and 15 cents were 1,000 cubic feet or 5.61/15 part of the fair market value of these properties as of the date of the investments, or at the most the same percentage of the purchase prices paid if the Court should think the purchase prices paid are a proper criterion for damages?

X. How can the petitioners be charged with the depletion of the producing gas wells when it is alleged by the respondents that the wells were of tremendous volume and the rock pressure was 772 pounds which is proven by respondents' expert witness, W. B. Maxwell, to be normal?

XI. Have the respondents been damaged by reason of the quality of the gas when it is shown in the record without contradiction that this gas is much more valuable than 15 cents per 1,000 cubic feet for the purposes for which it is being used, to repressure a large oil field in order to cause greater production of oil?

STATUTE INVOLVED.

Kentucky Revised Statutes, Sections 413.120 and 413.130:

"413.120. Actions to be brought within Five Years.

"The following actions shall be commenced within five years after the cause of action accrued:

* * * * * * *

"(12) An action for relief or damages on the ground of fraud or mistake."

"413.130. When certain actions in KRS 413.120 accrue; regulations for.

* * * * * * *

"(3) In an action for relief or damages for fraud or mistake, referred to in subsection (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten years after the time of making the contract or the perpetration of the fraud."

STATEMENT.

This petition seeks review of judgments of the United States Court of Appeals for the Sixth Circuit affirming the judgments of the United States District Court for the Eastern District of Kentucky at Lexington, Kentucky which rendered judgments against the petitioners.

This petition deals with seven cases containing many different issues, and we ask the indulgence of

this Court for the length of this petition as we are unable to state the material facts and issues in briefer terms.

These actions were commenced by the respondents on dates as follows:

Wayne R. Glock, *et al.*	July 3, 1953
G. A. McDowell, *et al.*	July 13, 1953
Claude C. Johnson	July 27, 1953
Robert E. Johnson	July 27, 1953
H. F. Garton	July 27, 1953
Dean Williams, *et al.*	February 1, 1954
R. R. Calvert, *et al.*	February 5, 1954

We will refer to each case by the last name of each respondent. These actions were instituted to recover the purchase prices of oil and gas leases, in the beginning as equitable actions without a tender back of the interests they purchased.

The case of Terrill v. Carpenter, 143 F. Supp. 747, 249 F. 2d 142, is a companion case to the cases at bar, and it was first tried by the United States District Court for the Eastern District of Kentucky and recoveries denied, which was affirmed by the United States Court of Appeals for the Sixth Circuit and reported.

After the decision in the Terrill case, substituted complaints were filed in these cases seeking recoveries for the purchase prices paid, and the name of the actions were changed from equitable to common law which actually did not change the nature of the actions. The district court rendered judgments for the full purchase prices paid and let the respondents retain

the valuable properties so purchased which violates the rights of the petitioners guaranteed to them by the Constitution of the United States and especially the Fifth Amendment thereto as depriving the petitioners of their property without due process of law.

The basis for federal jurisdiction in the district court was 28 U. S. C., Sections 1332 and 2201, the petitioners being citizens of the Commonwealth of Kentucky and the respondents being citizens of the State of Indiana, being diversity of citizenship cases and the amounts in controversy in each case exceeding exclusive of interest and costs, the sum of $3,000.00.

From adverse judgments of the district court the petitioners appealed to the United States Court of Appeals for the Sixth Circuit, and said judgments

FACTS.

were affirmed by said court.

The sole grounds alleged in the complaints as fraudulent concerned the quality of the gas. They alleged the gas wells when drilled were of tremendous volume and on account of approximately 42 per cent of the gas being carbon dioxide (CO_2) and some sulphur that the gas could not be turned directly into the pipe lines at the market price which was 15 cents per thousand British Thermal Units per one thousand cubic feet, and that the petitioner, A. H. Carpenter, knew the contents of the gas of the discovery well which was adjacent to the Smyth, Wise, Wasson and Nicholas farms at the time he sold interests to re-

spondents and the likelihood of the gas under said adjacent farms being of the same quality as that on the Garrett well..

The only distinguishing feature between these cases and the Terrill case is the fact that Carpenter knew of the analysis of the gas of the Garrett well before selling interests to the respondents in the adjacent leases and the probability that the four adjacent properties would produce the same kind of gas. The holdings of the court in these cases are in direct conflict with the holdings in the Terrill case, which correctly reflects the laws of Kentucky.

Recoveries were permitted in the Hall and Wells leases which were shown without contradiction to have been drilled over six and a half miles from the producing wells and north of the Irvine-Pitcairn fault which is shown to divide the surface of the earth to the granite or true earth, and shown by reputable geologists without contradiction to not be upon the same geological formations as the Garrett property and those properties containing the four producing wells. The Garrett and the properties with the four producing wells are shown to be south of the fault line.

The Garrett well was drilled in the Fall of 1947, and thereafter interests were sold in the oil and gas leases containing the productive wells adjacent to the Garrett property and thereafter in the Hall and Wells leases aforesaid.

After the petitioners and respondents examined the costs of a separation plant to sell the commercial gas

on the market and to manufacture dry ice out of the CO_2 content of the gas and to market the sulphur content, after respondents learned of the true analysis of the gas, which was in December 1948 and the first days of January 1949, in the early part of 1952 they executed powers of attorney to H. R. Witt, a petroleum engineer, who also had interests in the gas wells, to sell this gas at the well-head in accordance with the B. T. U. content of the gas at the rate of 15 cents pere 1,000 B. T. U. per 1,000 cubic feet; and since that time they have been selling the gas from these four producing gas wells at 9.39 cents per 1,000 cubic feet, and same is being purchased and used to repressure a large oil field near these properties by the Gulf Oil Corporation which owns productive wells in the vicinity.

All of the investments by the respondents in the four producing gas wells and in the Hall and Wells leases were made in the year 1948. Some representations were proven as to the four producing gas wells as to the quality of the gas, but none of the respondents testified that any representations were made before their investments in the Hall and Wells tracts. Non-productive wells were drilled on the Hall and Wells tracts after the completion of the four gas producing wells.

The petitioners filed their answers denying the fraud, pleading the five-year Statute of Limitations of the Commonwealth of Kentucky and alleging that in 1952 the respondents executed powers of attorney to Mr. Witt to sell the gas on the B. T. U. basis and had been selling same continuously since that time and

by virtue thereof they ratified the contracts and condoned any fraud that existed and were estopped to maintain these actions. In addition thereto in the McDowell case the petitioners plead the unconditional release, which same release was signed by Terrill, as a bar to his actions, and which release was expressly upheld in the Terrill case. In the Garton case the respondent plead the execution of an unconditional release and in avoidance of it, and the petitioners also set up this release in their defensive pleadings, and no evidence was introduced in avoidance of the release, which burden of proof was upon Garton, and the release so plead by both parties is not identified as being the release signed by Terrill and McDowell, but the district court gave judgment to Garton regardless of these pleadings.

REASONS FOR GRANTING THE WRIT.

The District Court for the Eastern District of Kentucky, affirmed by the Sixth Circuit Court of Appeals, has not correctly applied the laws of the Commonwealth of Kentucky material to the issues presented in these cases, and the judgments award to the respondents the purchase prices paid, crediting same only with the amount of the proceeds from the gas as received by them to the approximate date of the judgments, and permitting them to retain their valuable interests in the four producing gas properties, thereby depriving the petitioner, A. H. Carpenter, of his property without due process of law secured to him by the

Constitution of the United States and especially the Fifth Amendment thereof.

The evidence discloses without contradiction that the respondents were owed for approximately 30,000,000 cubic feet of gas by Mr. H. R. Witt, their trustee, which had not been paid by the Gulf Oil Corporation to the trustee at the time of the judgments, and no credit was given for the amount owing by the Gulf Oil Corporation.

The district court in the opinion states that the gas had little *commercial* value, but the court did not take into consideration that the gas had value. The word "commercial" was defined in the proof by geologist W. B. Maxwell as gas ready to turn into the lines for public consumption.

ARGUMENT OF THE CASE.

I. Can the Respondents Recover the Purchase Prices Paid for Interests in Oil and Gas Leases in Actions of Fraud, Proving Only the Amounts so Paid as the Measure of Damages, as Common Law Actions, and Also Be Permitted to Retain the Valuable Interests so Purchased, Under the Laws of the Commonwealth of Kentucky?

In Kentucky it is definitely settled that in actions for fraud where the purchase price is sought to be recovered, same are rescission actions and must be brought within a reasonable time after the discovery of the fraud, and any act of the vendee inconsistent with the ownership of the vendor thereafter ratifies the fraud, and the vendee is thereafter estopped to main-

tain the action. It is further held without contradiction that in all such cases the property received must be tendered back with the complaint.

Cox v. Riggins, 223 Ky. 570, 4 S. W. 2d 403; Dolle v. Melrose Properties, Inc., 252 Ky. 482, 67 S. W. 2d 706; Johns v. Masterson, 176 Ky. 399, 195 S. W. 819; Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S. W. 2d 1; Summers v. Carpenter, 156 Ky. 237, 160 S. W. 1064; Hartford Life Insurance Co. v. Hamblin, 139 Ky. 346, 104 S. W. 727.

The district court in its opinion referred to Dunn *et ux* v. Tate, 268 S. W. 925, as contrary to the rule in the cases aforesaid. In that case an action was sought to recover damages by reason of false representations that the house was water tight and the roof and the basement did not leak. However, in that opinion the previous cases referred to herein were distinguished on the ground that the previous cases being for the purchase price paid were in fact rescission cases regardless of whether they were called equitable or common law cases. The case of Dunn v. Tate was not a case for any part of the purchase price paid.

It is stated in the Head case, which is the law of Kentucky, as follows:

> "Where fraud had been committed in the obtaining of a contract, it may be taken advantage of in two forms: (1) By an affirmance of the contract and a recovery of damages for the injury; (2) by a disaffirmance of the contract and a recovery of the thing parted with as the consideration. By the latter, the contract is treated as a

> nullity. This mode can only be adopted upon certain terms; those terms are: That he surrender or tender a surrender within a reasonable time to the other contracting party the thing which he has received under the disaffirmed contract. He is not permitted to hold onto the thing which he has received and successfully effect a restoration of the thing which he has parted with under the contract."

To the same effect is Sparks v. Baker, 272 Ky. 663, 114 S. W. 2d 1145.

II. Can Respondents Recover at Common Law in Kentucky on Contracts Induced by Fraud Where the Success or Failure of the Investments Depend on Future Events, and When After Full Knowledge of the Facts Alleged, They Ratify the Contracts by Selling the Gas Produced and Receiving the Proceeds Therefrom?

This can not be done under Kentucky law, and we refer the Court to the recent case of the Court of Appeals of Kentucky decided February 2, 1960, being the case of Hampton v. Suter, reported in 330 S. W. 2d 402, which contains the last utterance of the Court of Appeals of Kentucky relevant to the issues presented in these cases. We quote from that opinion as follows:

> "Fraud inducing a contract may be waived by affirmance that is equivalent to ratification of the contract by the party who claimed to have been deceived into entering into it. That ratification may be shown by his acts after he acquired full knowledge of the real facts and had shown a clear intent

to affirm the contract despite the fraud, as where he accepted the benefits thereof or acted in a manner inconsistent with repudiation. The intention may be in part shown by a failure to act promptly to repudiate the transaction. 17 C.J.S. Contracts Sec. 165b; 24 Am. Jur., Fraud and Deceit, Sec. 209; Cox v. Riggins, 223 Ky. 510, 4 S. W. 2d 403; Gargotto v. Sherman, 297 Ky. 597, 180 S. W. 2d 565; Barrowman Coal Corp. v. Kentland Coal & Coke Co., 302 Ky. 803, 196 S. W. 2d 428.

"Ordinarily, one claiming to have been defrauded into making a contract has an option either to disaffirm the contract and seek its rescission or to affirm the contract and seek his remedy by an action for damages; he may not follow inconsistent remedies. Webb v. Verkamp Corp., Ky., 254 S. W. 2d 717. He has but one election, and if he affirms the contract, his election is irrevocable and he condones the fraud. Perkins v. Jackson, 276 Ky. 217, 123 S. W. 2d 247. The inconsistency of the prayer of the complaint in the instant case does not seem to have been challenged.

"It is readily apparent that the plaintiff was not entitled to a rescission of the contract for he did not move promptly and was unable to restore the consideration for the contract, or the status quo ante of the business purchased. So, we are concerned only with the question of whether or not the plaintiff was entitled to a judgment for damages by the court or the submission of the issue to a jury on the ground of failure of consideration.

"The rule of waiver of fraud and ratification of a contract may be applicable to an action for damages for breach of the contract as well as to

a suit to rescind. Hampton accepted the fraudulently induced contract relating to the Buick agency as fulfilling the consideration requirement and could not await the result of the adventure and then repudiate it. In Summers v. Carpenter, 156 Ky. 337, 160 S. W. 1064, it was held that a party claiming to have been induced by fraud to enter into a contract of purchase of property had waived his right of action for damages by his acts and conduct after having discovered the alleged fraud."

It will therefore be observed:

(1) That any actions for the purchase price paid as the result of fraud are rescission cases.

(2) Where the success or failure of an investment depends upon future events, the person defrauded condones the fraud in those cases where he learns of the fraud and abides by the contract instead of disaffirming it within a reasonable time after learning of the fraud.

The Hampton case aforesaid reaffirms the law in Cox v. Riggins which was cited with approval in the Terrill opinion. The case of Dunn v. Tate does not overrule that case but distinguishes it, but the Hampton case reaffirms it and the other cases herein referred to.

III. Can the Respondents Recover Against the Petitioners When They, After Learning of the True Analysis of the Gas, Have Executed Sale Orders to Sell the Gas and Have Continued to Sell the Gas and Are Now Doing So?

We respectfully submit they can not as discussed under the two previous headings.

IV. Were the Rights of A. H. Carpenter Violated Under the Provisions of the Constitution of the United States and Particularly the Fifth Amendment Thereof by Permitting the Respondents to Retain the Valuable Properties He Sold Them and to Recover From Him the Full Purchase Prices Paid?

This question was raised in the United States Court of Appeals for the Sixth Circuit. We submit that in these cases the valuable properties of Mr. Carpenter were permitted to be retained by the respondents and they recovered the purchase prices paid, credited with the amounts received from gas as aforesaid. The considerations they paid have been restored to them, and they have been permitted to keep the properties.

We refer the Court to 11 American Jurisprudence, Sections 334 and 335, pages 1143-1147, inclusive; Terrace v. Thompson, 263 U. S. 197; Buchanan v. Warley, 245 U. S. 60; Lynch v. United States, 292 U. S. 571.

V. Since Dr. G. A. McDowell Signed the Same Release That Was Signed by Dr. R. W. Terrill on the 15th Day of April, 1951, Long After He Knew the True Analysis of the Gas, Are His Actions Herein Barred Against the Petitioners as Held in the Case of Terrill v. Carpenter, 143 F. Supp. 747, 249 F. 2d 142, and the Cases Therein Referred to, When He Testified to No Facts in Avoidance of the Release?

The holding of the district court and that of the Sixth Circuit Court of Appeals is not understandable to us because this release was expressly upheld in the Terrill case as releasing all claims. This release was executed long after all of the investments were made by the respondents and after full knowledge of the quality of the gas. We refer the Court to the Terrill case construing this release.

VI. Dr. H. F. Garton Plead an Unconditional Release After Full Knowledge of All of the Facts and in Avoidance of It, and the Petitioners Likewise Alleged the Release, and No Evidence Was Introduced in Avoidance of the Release, and Recovery Is Permitted by Him; and Why Are His Actions Not Barred by the Pleadings?

There was no evidence introduced concerning the release of Dr. Garton, and it is not identified as the same release signed by Drs. McDowell and Terrill. How can lawyers practice law when they can not rely upon the pleadings in the case? This was brought to the attention of the district court and to the circuit court of appeals, and we were unable to get any action on it. We raised these questions in our motion and

grounds for new trial in the district court and the two additional briefs were prepared in that court as well as the release signed by McDowell and Terrill.

VII. The Statute of Limitations of Kentucky Is Fully Dealt With in the Companion Case of Terrill v. Carpenter Aforesaid, and Why Was Not the Statute of Limitations Which Was Plead in All of These Cases Applied in These Cases as Was Applied in the Terrill Case?

A large number of the claims of the respondents are barred by the five-year Statute of Limitations of Kentucky. It is shown in the record without contradiction that Dean Williams and Dr. R. R. Calvert instituted their actions in February 1954, and not only more than five years after their investments but more than five years after the discovery of the true quality of the gas.

There is no evidence shown by any of the respondents of any diligence, and we refer the Court to the Terrill opinion which correctly sets forth the law in Kentucky construing the Statute of Limitations but which case was not followed in the cases at bar.

VIII. The Discovery Well Was on the Garrett Farm. The Four Producing Gas Wells in Which Respondents Invested Are Located on the Properties Adjacent to the Garrett Farm and Are Known as the Smyth, Wise, Wasson and Nicholas Farms. Dry Wells Were Drilled on the Wells and Hall Leases Approximately Seven Miles From the Producing Wells. The Hall and Wells Leases Are Shown To Be North of the Irvine-Pitcairn Fault Line, and the Geological Formations Are Shown Not To Be the Same as the Four Producing Properties, and There Is No Evidence of Any Representations Concerning the Hall and Well Properties. By What Legal Authority Did the Court Refund the Monies to Respondents Paid for Interests in the Hall and Wells Properties?

Again we refer the Court to the Terrill opinion which refers to the case of Engemann v. Allen, Trustee, 201 Ky. 483, 484, which holds that any representations concerning the continued production of oil and gas or whether or not the drilling of a well will produce oil and gas are not material representations because one alleged to be defrauded must know that such representations could not be true and must know that there is no way of ascertaining the continued production of oil and gas or whether or not the drilling of a well will produce oil or gas and such representations could not be relied upon. The Terrill opinion deals exhaustively with this issue.

If the decision with regard to the Hall and Wells tracts stands, the respondents could have recovered for interests in oil and gas leases sold located anywhere. The wells were drilled on the Hall and Wells tracts

primarily for oil, and the Hall well was drilled to the granite which cost Mr. Carpenter approximately $75,000.00. The locations for the wells on these two tracts were made by the chief geologist of the California Company, a large producing corporation of the Standard Oil group, which corporation had large number of leases north of the fault line and wanted those test wells drilled.

IX. Since the Only Grounds Alleged for Recovery in These Cases Is the Quality of the Gas as Containing Approximately 42 Per Cent Carbon Dioxide and Some Sulphur, and It is Shown That the Market Value of Gas at the Well Head Without Such Content Was 15 Cents Per 1,000 British Thermal Units Per 1,000 Cubic Feet, and the B.T.U. Content of the Gas Was Reduced by Reason of the CO_2 Content and Sulphur, and the Respondents Appointed H. R. Witt Their Agent to Sell the Gas on a B.T.U. Content Basis, Which Is Being Sold by Them at 9.39 Cents Per 1,000 Cubic Feet, Why Would Not the Respondents Be Limited to Recover the Difference Between 9.39 and 15 Cents Per 1,000 Cubic Feet or 5.61/15 Part of the Fair Market Value of These Properties as of the Date of the Investments, or at the Most the Same Percentage of the Purchase Prices Paid if the Court Should Think the Purchase Prices Paid Are a Proper Criterion for Damages?

The respondents proved no measure of damages but only the amount of money they paid for these properties. The petitioners introduced evidence showing the difference between the fair market value of these properties as of the date the interests were sold to the respondents containing the quality of gas ready to turn

into the pipe line for public consumption and with the gas as actually analyzed. It is shown by such evidence that there is no difference in the fair market value of these properties due to the fact that the gas is more valuable than commercial gas for repressuring oil wells and has a greater market value than 15 cents per 1,000 cubic feet. The evidence of Mr. Groppe, one of the great experts in the country, disclosed that this gas for the purposes for which it is being used is worth in excess of one dollar per 1,000 cubic feet because carbon dioxide is more valuable than the methane gas by reason of the fact that it does not disintegrate and can be resacked and reused while methane gas has a tendency to liquefy.

It is established in this record without contradiction that there is a market for all of this gas in the adjacent oil fields, and it is being marketed and sold by the respondents for much less than it is worth.

The Court of Appeals of Kentucky applies the rule as to damages which can be best measured. In the case of Western Union Telegraph Co. v. Guard, 283 Ky. 187, 139 S. W. 2d 722, it is stated that one is entitled to compensation for the injuries sustained but is not to be placed in a better position than he would have been had the wrong not been done, that only such damages are recoverable for a tort as can be shown with reasonable certainty and as are the direct natural and proximate consequences of the defendant's wrongful act.

We further refer the Court to Kentucky Utilities Co. v. Consolidated Telephone Co., 252 S. W. 2d 437, which is another case of conforming damages.

Another case of conforming damages is the case of Nunn v. Howard, 288 S. W. 678, 216 Ky. 685, wherein the Court held that where it was represented that a well on the land had lasting and good water that the measure of damages was the cost of drilling another well.

It appears this Court follows this rule. Sighuf v. Porter, 179 U. S. 116; Smith v. Bowles, 132 U. S. 125; Elbidge v. Steelwagon Manufacturing Co., 279 U. S. 841; Farquhal v. Hensley, 275 U. S. 561.

Cases in Kentucky adopting the measure of damages as the difference between the fair market value of the property as represented and as it was are: Elesey v. Lampkin, 162 S. W. 106, 156 Ky. 836, that the damages for concealment of a cemetery on the farm was held to be the difference between the fair market value of the farm without the cemetery and with it; Bunch v. Bertram, 219 Ky. 848, 294 S. W. 805, that the measure of damages for representations that the basement did not leak was the difference in the fair market value of the property as represented and as was.

The district court in effect charged Carpenter with the depletion of the producing wells, and we submit this was error. The wells had depleted more than the usual gas wells. The question material here is what damages have been sustained by the respondents by reason of the quality of the gas. If we were to con-

cede, which we do not, that the gas is being sold at a fair price, the only damages recoverable by the respondents would be the difference between 9.39 cents per 1,000 cubic feet and 15 cents per 1,000 cubic feet, which would be, as we contend, 5.61/15 part of the fair market value of these properties as of the date of the investments or of the purchase price paid for these producing properties. Indeed this would be the proper measure of damages by reason of the CO_2 and sulphur content of the gas. Surely the respondents should not be permitted to recover the purchase prices paid and be permitted to keep the properties. Such holding is not understandable to us. Conforming damages should be applied in these cases as same can be applied with certainty.

The district court referred to the case of Sanders v. Chesmotel which involved new personal property, and the measure of damages as to new personal property is different from used personal property and real estate transactions. The court there permitted a recovery of the purchase price paid but credited the fair market value of the air conditioners against the purchase price.

There is no case in Kentucky whereby one can recover the purchase price for real estate on the grounds of misrepresentation except in rescission cases, and in those cases the property must be tendered back and a disaffirmance of the contract within a reasonable time after the discovery of the fraud.

X. How Can the Petitioners Be Charged With the Depletion of the Producing Gas Wells When It Is Alleged by the Respondents That the Wells Were of Tremendous Volume and the Rock Pressure Was 772 Pounds Which Is Proven by Respondents' Expert Witness, W. B. Maxwell, To Be Normal?

If the opinion and judgments in these cases are permitted to stand, the vendor of oil properties would be charged with warranting the future production of the properties. These producing wells were of large volume with a normal rock pressure, and surely this Court will not permit Mr. Carpenter to be charged with the depletion of the wells.

The only ground relied upon in the complaints of the respondents is the quality of the gas and not the volume nor future production of the gas.

XI. Have the Respondents Been Damaged by Reason of the Quality of the Gas When It Is Shown in the Record Without Contradiction That This Gas Is Much More Valuable Than 15 Cents Per 1,000 Cubic Feet for the Purposes for Which It Is Being Used, to Repressure a Large Oil Field in Order to Cause Greater Production of Oil?

Mr. Henry Gröppe, a chemical engineer of Houston, Texas, among whose clients are the large pipe lines transporting gas from the southwest to the Eastern part of the United States, testified that the gas in the four producing wells which had a market in the oil fields for repressuring oil wells was actually worth more than one dollar per 1,000 cubic feet for the reasons previously stated herein.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

THOMAS D. SHUMATE,
SHUMATE & SHUMATE,
Irvine, Kentucky,

M. A. ROWADY,
Winchester, Kentucky,
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

A. H. Carpenter, Et Al.,
v. No. 14,202
Wayne R. Glock, Et Al.

A. H. Carpenter, Et Al.,
v. No. 14,203
G. A. McDowell, Et Al.

A. H. Carpenter, Et Al.,
v. No. 14,204
Claude C. Johnson.

A. H. Carpenter, Et Al.,
v. No. 14,205
Robert E. Johnson.

A. H. Carpenter, Et Al.,
v. No. 14,206
H. F. Garton.

A. H. Carpenter, Et Al.,
v. No. 14,207
Dean Williams, Et Al.,

A. H. Carpenter, Et Al.,
v. No. 14,208
R. R. Calvert, Et Al.

JUDGMENT—January 13, 1961.

These consolidated cases hav been heard and considered upon the extensive record and upon the briefs and oral arguments of counsel for the parties; and

It appearing that the decision of the trial judge is clearly set forth by him in his opinion-findings and conclusions; that his findings of fact in each case are supported by substantial evidence and are not clearly errone-

ous; and that his conclusions of law are correctly drawn and based upon proper authority;

It is, therefore, ordered that the judgment of the United States District Court in each case be affirmed upon the comprehensive findings, conclusions and opinion of Judge Ford.

Enter:

(s) John D. Martin,
United States Circuit Judge.

APPENDIX B

ORDER DENYING REHEARING—March 10, 1961.

The Appellants' Petition for Rehearing is denied.

(s) John D. Martin,
United States Circuit Judge.

ORDER DENYING SUPPLEMENTAL PETITION FOR REHEARING—March 13, 1961.

The Appellants' Supplemental Petition for Rehearing is hereby denied.

(s) John D. Martin,
United States Circuit Judge.

APPENDIX C

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
Lexington

Wayne R. Glock, et al.,
v. No. 1033
A. H. Carpenter, et al.

Grace Williams, et al.,
v. No. 1072
A. H. Carpenter, et al.

Raymond R. Calvert,
v. No. 1076
A. H. Carpenter, et al.

G. A. McDowell, et al.,
v. No. 1035
A. H. Carpenter, et al.

Robert E. Johnson,
v. No. 1046
A. H. Carpenter, et al.

H. F. Garton,
v. No. 1048
A. H. Carpenter, et al.

Claude C. Johnson,
v. No. 1044
A. H. Carpenter, et al.

Consolidated Cases.

OPINION—Filed January 6, 1960.

Plaintiffs seek damages for fraud alleged to have been practiced upon them by the defendant A. H. Carpenter and his agent, J. F. Shepperd, in inducing them to purchase fractional working interests in gas leases owned by the defendant Carpenter upon lands located in an area referred to in the testimony as the "Furnace Area" in Powell and Estill Counties, Kentucky.

The above entitled cases were consolidated for trial and were tried to the Court without the intervention of a jury.

The facts disclosed by the record are in substance as follows:

South Central Petroleum Corporation, of which the defendant A. H. Carpenter was president, owned a gas lease located in the Furnace Area in Estill county upon the farm of J. M. Garrett.

Commencing on August 12, 1947, the South Central Petroleum Corporation, with Carpenter in charge as contractor, drilled a gas well upon the Garrett lease. The well was completed September 30, 1947, and it had the appearance of substantial gas production. This well is known and referred to in the record as "Garett No. 1" and it is also referred to as the "discovery well."

On October 7, 1947, at the invitation of Mr. Carpenter, W. B. Maxwell, manager of the Geology Department of the United Fuel and Gas Company, Charleston, W. Va., made a field test of the gas in Garrett No. 1 which revealed the gas from this well to be contaminated in that it was 45% carbon dioxide, a gas which would not burn, and contained 300 grains of hydrogen sulfied, a corrosive, per hundred cubic feet, all of which was promptly reported to Mr. Carpenter, together with the information that United Fuel would not purchase the gas from this well so contaminated unless the contamination were removed. Mr. Maxwell later mailed to Mr. Carpenter a copy of the laboratory analysis which confirmed the field analysis.

For the same corporation and upon the same farm Mr. Carpenter completed the drilling of a second gas well on December 14, 1947, referred to in the evidence as Garrett No. 2, the test of which showed the gas from it to be contaminated to the same extent as Garrett No. 1. Mr. Carpenter made a diligent investigation as to the prospect

of cleaning the contaminated gas produced from these wells. The high cost of such procedure was obviously quite prohibitive.

Shortly after Garrett No. 1 was completed and tested, Mr. Carpenter by his agent, J. F. Shepperd, inaugurated an energetic campaign to sell fractional working interests to the plaintiffs, all of whom resided out of the State of Kentucky, in gas leases which Carpenter individually acquired in a large area in the general neighborhood of the Garrett farm, known as the "Furnace Area", which leases were upon farms referred to in the record as the "Hood Wise" lease, "Elbert Wasson" lease, "Ida Barnes Nicholas" lease, "Tipton" lease, "James Smyth" lease, "James Hall" lease, and "Pete Wells" lease.

During the course of the procedure to induce plaintiffs to invest in these leases, the various plaintiffs, sometimes accompanied by Mr. Shepperd, visited Mr. Carpenter at Winchester, Kentucky, and were conducted on tours of inspection of the so-called gas field and on such occasions Mr. Carpenter represented that the well known as Garrett No. 1 signified an enormous gas discovery in that area; that the gas produced was pure, sweet, premium gas and all that needed to be done to realize a large profit was to turn it into a pipeline and put meters on the wells; that the gas could be marketed readily; that a gas transmission company would be willing to put in a pipeline to take the gas, and that a fabulous profit could be realized by investors in the wells. There is testimony indicating that Shepperd made representations similar to those made by Carpenter to induce plaintiffs to invest in the leases and that Carpenter said he would back up and stand behind anything Shepperd said in regard to the wells. Carpenter and Shepperd met with some of the plaintiffs in Indiana, where most of them resided, and made substantially the same representations in respect to the quality of the gas

and the enormous profits to be derived from investments in fractional working interests in the wells being drilled and proposed to be drilled in the Furnace Area.

These representations related to matters of material fact. They were false and were made by Carpenter as well as by Shepperd with knowledge that they were false and under circumstances which did not justify honest belief in their truth. Such representations went far beyond the permissible limits of legitimate "sales talk".

At the time of their investments the plaintiffs were unaware of the facts as to the inferiority of the gas produced in the discovery well. The facts disclosed by the analysis of the gas were concealed by the defendant Carpenter. Such concealment under the attendant facts and circumstances, as well as the assertion of what was false, constituted actionable fraud. Fields v. Cornett, et al., 254 Ky. 35, 42; Kaze v. Compton, Ky., 283 S. W. 2d 204, 207.

The plaintiffs relief upon the representations made by Carpenter and Shepperd and were induced thereby to make and did make investments as hereinafter stated in fractional working interests in the leases, payments for which were made through Shepperd and were sent to and received by Carpenter. Mr. Carpenter drilled wells on certain of the leases, some of which produced gas, but all of which gas was contaminated to substantially the same extent as the Garrett wells.

In 1952 and 1953 the plaintiffs and others who had purchased interests in the wells in question joined in a contract employing Harry G. Witt to market the gas and to distribute to the respective owners their proportionate share of the net proceeds. Since 1952 the gas has been marketed to South Central Petroleum Corporation which resold some of it to a nearby brick plant for firing brick and has used the remainder for running engines of oil well pumps, repressuring and experimentation in the secondary

recovery of oil. In Dunn v. Tate, 268 S. W. 2d 925, the Kentucky Court of Appeals held that by such action defrauded purchasers are not precluded from maintaining actions for damages and that the language of previous decisions to the contrary was merely *obiter dictum*.

By 1954 the rock pressure of the gas wells had declined considerably and has continued to decline rapidly. On February 9, 1958, the pressure of the James Smyth well was 110 pounds, the Hood Wise 70 pounds and the Elbert Wasson 65 pounds. The leases in which plaintiffs invested have little or no commercial value.

It appears from the record the investments made by the plaintiffs respectfully and the amounts received by each of them from gas sales made by Mr. Witt are as follows:

DR. WAYNE R. GLOCK on December 11, 1947, paid $2,000 for 1/16 of 7/8 working interest in the Hood Wise lease; on March 29, 1948, he paid $2,562.50 for 1/64 of 7/8 working interest in the Hood Wise lease; on April 28, 1948, he paid $8,000 for 1/16 of 7/8 working interest in the Elbert Wasson lease; on June 8, 1948, he paid $3,000 for 1/64 of 7/8 working interest in the Ida Barnes Nicholas lease, and on August 16, 1948, he paid $1,875 for 1/128 of 7/8 working interest in the Jim Hall lease. The total investment of this plaintiff was $17,437.50. From the operations by Mr. Witt he received $739.69, resulting in a pecuniary loss to him in the sum of $16,697.81.

DR. RAYMOND R. CALVERT on May 3, 1948, paid $8,000 for 1/16 of 7/8 working interest in the Elbert Wasson lease; on June 7, 1948, he paid $12,000 for 1/16 of 7/8 working interest in the Ida Barnes Nicholas lease; on August 16, 1958,* he paid $7,500 for 1/32 of 7/8 working interest in the James Hall lease, and on December 15, 1948, he paid $3,500 for 1/64 of 7/8 working interest in the Pete

*This is a typographical error and should read 1948.

Wells lease. The total investment of this plaintiff was $31,000. From the operations by Mr. Witt he received $940.92, resulting in a pecuniary loss to him in the sum of $30,059.08.

ROBERT E. JOHNSON on August 23, 1948, paid $1,875 for 1/128 working interest in the James Hall lease. From the operations by Mr. Witt this plaintiff received $57.71 from a 1/128 of 7/8 working interest in the Hood Wise lease which was given to him by Carpenter in exchange for plaintiff's interest in two oil wells which had turned out to be dry holes. The resultant pecuniary loss to this plaintiff was $1,817.29.

CLAUDE C. JOHNSON on November 8, 1948, paid $3,500 for 1/64 of 7/8 working interest in the Pete Wells lease. From the operations by Mr. Witt he received $117.75 from a 1/128 of 7/8 working interest in Elbert Wasson lease which was given to him by Carpenter in exchange for an investment in an oil lease on which the well was dry, and from joint investments with Dr. H. F. Garton hereinafter enumerated. The resultant pecuniary loss to this plaintiff was $3,382.25.

DEAN WILLIAMS on June 10, 1948, paid $12,000 for 1/16 of 7/8 working interest in the Ida Barnes Nicholas lease; on August 21, 1948, he paid $3,750 for 1/64 of 7/8 working interest in the James Hall lease, and on October 29, 1948, he paid $1,500 for 1/128 of 7/8 working interest in the Pete Wells lease. The total investment of this plaintiff was $17,500. From the operations by Mr. Witt, he received $480.32, resulting in a pecuniary loss to him in the sum of $16,769.92.

DR. G. A. McDOWELL, as shown by stipulation (Tr. 460), invested a total sum of $23,250 in various of the leases. From the operations by Mr. Witt he received $611.08, resulting in a pecuniary loss to him in the sum of $22,639.92. The defendant, A. H. Carpenter, sets up as

a defense to the claim of Dr. McDowell a document signed by him releasing all claims against Carpenter and his agent J. F. Shepperd growing out of the leasing of certain oil wells on property known as the Pilot Property in Eastern Kentucky. This release does not relate to or bar any of the claims asserted in this action.

DR. H. F. GARTON on December 10, 1947, paid $1,000 for 1/32 undivided working interest in the Furnace Area, referred to as the "Pres Smith farm". On February 9, 1948, he paid $1,000 for 1/64 undivided working interest in 200 acres in the Furnace Area, and on October 14, 1948, he paid $3,500 for 1/64 of 7/8 working interest in the Pete Wells lease. The total investment of this plaintiff was $5,500. From the operations by Mr. Witt plaintiff has received, including receipts from joint investments with Claude C. Johnson hereinafter enumerated, $788.31, resulting in a pecuniary loss to him in the sum of $4,711.69.

DR. H. F. GARTON and CLAUDE C. JOHNSON on June 8, 1948, jointly paid $3,000 for 1/64 of 7/8 working interest in the Ida Barnes Nicholas lease; on August 23, 1948, they paid $7,500 for 1/32 of 7/8 working interest in the James Hall lease. The total joint investment of these plaintiffs was $10,500. From the operations of Mr. Witt they received certain sums which have been credited against their separate individual investments. The resultant pecuniary loss to these plaintiffs from their joint investments is the sum of $10,500.

The large and apparently exorbitant prices which plaintiffs were induced to pay for the purchase of small fractional working interests in these leases are further indication of the fraudulent scheme of Carpenter and Shepperd to secure large sums of money from credulous investors. Henderson v. United States, C. A. 6, 202 F. 2d 400, 404.

As late as April, 1949, Carpenter was still representing to investors that the gas was not being marketed because the field was not fully developed. Defendants' contention that the actions are barred by the five-year Kentucky Statutes of Limitation relating to fraud (KRS 413.120 and 413.130) seems untenable.

In addition to the claims for damages, plaintiffs seek to have set aside, as a transfer made without consideration and with the intention of defrauding creditors in violation of Kentucky Revised Statutes 378.010 and 378.020, the purchase of certain shares of stock in the South Central Petroleum Corporation by Carpenter in the name of his wife the defendant, Margaret L. Carpenter.

On February 17, 1948, the defendant Margaret L. Carpenter entered into a contract with James F. Frenzel by which she agreed to purchase all the latter's interest in the South Central Petroleum Corporation for a consideration of $18,000, of which sum $2,000 was to be paid on the signing of the contract and the remainder at the rate of $1,000 per month. The interest acquired by the defendant Margaret L. Carpenter under this contract was represented by 82 shares of stock which were transferred to her on July 16, 1949, after the final payment on the contract.

The $2,000 down payment was made by A. H. Carpenter for his wife by check dated February 17, 1948. The check bears the notation "for Margaret L. Carpenter contract dated 2-17-48." Twelve of the remaining payments were made by Carpenter by checks drawn on his personal account. Two other payments were made by Carpenter by checks drawn on the account of South Central Petroleum Corporation and signed by him for the Corporation. These payments made by Carpenter total $16,000. Margaret L. Carpenter made two payments in the amount of $1,000 each by checks dated December 16, 1948, and January 17, 1949, drawn on "Oil Account."

The "Oil account" money was obtained by Margaret L. Carpenter as royalties from an oil lease known as the Children's Home Lease, which she acquired August 4, 1948, the consideration for which lease was also paid by A. H. Carpenter, but which lease was taken in the wife's name.

Margaret L. Carpenter testified that she had no property when she married Carpenter in 1941; had inherited no property; that she had worked a few months in a restaurant in Cincinnati in 1945 and in Texas in 1946. She further testified that she had not been paid for work in the office of the South Central Petroleum Corporation prior to 1950.

Mrs. Carpenter testified that the payment for the stock by her husband was in the nature of a loan, and that she had repaid him. He also testified she had repaid him and introduced two checks dated in January, 1949, showing she had reimbursed him in the amount of $3,000 out of the "Oil account." They further testified that a check evidencing a repayment by Mrs. Carpenter in the amount of $5,000 had become lost.

Sonia Frenzel Hoadley, widow of James F. Frenzel, who died in 1950, testified that when her late husband talked to Carpenter about selling him his interest in South Central Petroleum Corporation, Carpenter told her he did*n't* want to purchase the stock in his own name because he had too many creditors, but that he would discuss the matter with his wife and put the stock in her name. Carpenter denied this conversation.

In respect to this transaction, Mrs. Carpenter has not sustained the burden of proof resting upon her.

Pursuant to order of September 2, 1959, the issues made by the pleadings against the California Company were severed from other issues of this case and will be set for trial at a future date.

CONCLUSIONS OF LAW.

(1) The Court has jurisdiction of the parties and the subject matter involved in these actions. Title 28 USCA 1332.

(2) Concealment of material facts as well as misrepresentation of material facts as shown herein constituted actionable fraud. Fields v. Cornett, 254 Ky. 35, 42; Kaze v. Compton, 283 S. W. 2d 204, 207.

(3) In Sanders, Inc. v. Chesmotel Lodge, 300 S. W. 2d 239, 241, the Kentucky Court of Appeals said:

> "The fundamental rule in assessing damages for fraud is that the victim of fraud is entitled to compensation for every wrong which was the natural and proximate result of the fraud. 24 Am. Jur., Fraud and Deceit, Section 226, page 54. In Restatement of the Law of Torts, Volume 3, Section 549, page 108, the rule is stated as follows:
>
> "'The measure of damages which the recipient of a fraudulent misrepresentation is entitled to recover from its maker as damages * * * is the pecuniary loss which results from the falsity of the matter misrepresented including
>
> "'(a) the difference between the value of the thing bought, sold or exchanged and its purchase price or the value of the thing exchanged for it, and
>
> "'(b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the truth of the representation.'"

Under this authority, the damages which the plaintiffs are respectfully entitled to recover from the defendant A. H. Carpenter is the pecuniary loss sustained by them as the proximate result of the fraudulent concealment and misrepresentations herein set out, as hereinabove computed.

Sanders, Inc. v. Chesmotel Lodge, Ky., supra; Restatement of the Law of Torts, Vol. 3, Sec. 549, page 108.

(4) When a transaction between persons occupying a confidential relationship, such as the transfer of stock by the defendant A. H. Carpenter to his wife, Margaret L. Carpenter, is exposed to scrutiny, the burden is always upon the recipient of the property to show that the conveyance was fairly made and not tainted with an intent to accomplish a fraudulent purpose. As above stated, the defendant Margaret L. Carpenter has not met this burden. The transfer of stock to her was in violation of Kentucky Revised Statutes, Secs. 378.010 and 378.020 and should be set aside. Bolling v. Adams, Ky., 296 S. W. 2d 696.

(5) In each of the above entitled cases judgment should be entered in favor of the respective plaintiffs against A. H. Carpenter and Margaret L. Carpenter, his wife, in conformity with the views herein expressed. Each of the judgments so entered will bear interest from the date of entry.

(s) H. Church Ford,
Judge.

January 6, 1960.

APPENDIX D

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1033

Wayne R. Glock and
Blanch D. Glock, - - - - - - - - Plaintiffs,

v.

A.H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that these plaintiffs, Wayne R. Glock and Blanch D. Glock, recover of the defendant, A. H. Carpenter, Sixteen Thousand, Six Hundred and Ninety-Seven and 81/100 ($16,697.81) dollars, with interest thereon at the rate of six (6%) per annum, from date of entry of this judgment until paid, and their costs herein.

It is further hereby Ordered and Adjudged that the transfer of eighty-two (82) shares of stock in the South Central Petroleum Corp., from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the cor-

poration on or about July 16, 1949, was and is a fraudulent transfer of this stock to her in violation of Kentucky Revised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered And Adjudged.

(s) H. Church Ford, Judge
United States District Court for
the Eastern District of Kentucky,
at Lexington.

Entered: January 12, 1960.

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1035

G. A. McDowell and
Ferne McDowell, - - - - - - - Plaintiffs,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that these plaintiffs, G. A. McDowell and Ferne McDowell, recover of the defendant, A. H. Carpenter, Twenty-Two Thousand, Six Hundred and Thirty-eight and 92/100 ($22,638.92) dollars, with interest thereon at the rate of six (6%) per annum from date of the entry of this judgment, until paid, and their costs herein.

It is further hereby Ordered And Adjudged that the transfer of eight-two (82) shares of stock in the South Central Petroleum Corp., from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the corporation on or about July 16, 1949, was and is a fraudulent

transfer of this stock to her in violation of Kentucky Revised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered and Adjudged.

(s) H. Church Ford, Judge,
United States District Court for
the Eastern District of Kentucky,
at Lexington.

Entered: January 12, 1960.

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington

No. 1044

Claude C. Johnson, - - - - - - Plaintiff,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that this plaintiff, Claude C. Johnson, recover of the defendant, A. H. Carpenter, Three Thousand, Three Hundred and eighty-two and 25/100 ($3,382.25) dollars, with interest thereon at the rate of six (6%) per annum, from the date of the entry of this judgment, until paid, and his costs herein.

It is further hereby Ordered and Adjudged that the transfer of eighty-two (82) shares of stock in the South Central Petroleum Corp., from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the corporation on or about July 16, 1949, was and is a fraudulent transfer of this stock to her in violation of Kentucky Re-

vised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered and Adjudged.

(s) H. Church Ford, Judge,
United States District Court for
the Eastern District of Kentucky
at Lexington.

Entered: January 12, 1960.

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1046

Robert E. Johnson, - - - - - Plaintiff,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that this plaintiff, Robert E. Johnson, recover of the defendant, A. H. Carpenter, One Thousand, eight hundred and seventeen and 29/100 ($1,817.29) dollars, with interest thereon at the rate of six (6%) per cent per annum, from date of the entry of this judgment, until paid, and his costs herein.

It is further hereby Ordered and Adjudged that the transfer of eighty-two (82) shares of stock in the South Central Petroleum Corp. from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the corporation on or about July 16, 1949, was and is a fraudulent transfer of this stock to her in violation of Kentucky Re-

vised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered and Adjudged.

(s) H. Church Ford, Judge,
United States District Court for
the Eastern District of Kentucky,
at Lexington.

Entered: January 12, 1960.

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1048

H. F. Garton, - - - - - - - - Plaintiff,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that this plaintiff, H. F. Garton, recover of the defendant, A. H. Carpenter, Four Thousand, Seven Hundred and Eleven and 69/100 ($4,711.69) dollars, with interest thereon at the rate of six (6%) per cent per annum, from date of entry of this judgment, until paid, and his costs herein.

It is further Adjudged that said H. F. Garton and said Claude C. Johnson, jointly invested $10,500.00, and it is Ordered and Adjudged that they shall have judgment in the said amount against the defendant, A. H. Carpenter, for Ten Thousand, Five Hundred and no/100 ($10,500.00) dollars, with interest thereon at the rate of six (6%) per cent per annum, from date of the entry of this judgment, until paid, and their costs herein expended.

It is further hereby Ordered and Adjudged that the transfer of eight-two (82) shares of stock in the South Central Petroleum Corp., from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the corporation on or about July 1st, 1949, was and is a fraudulent transfer of this stock to her in violation of Kentucky Revised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered and Adjudged.

(s) H. Church Ford, Judge,
United States District Court for
the Eastern District of Kentucky,
at Lexington.

Entered: January 12, 1960.

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1072

Dean Williams and
Grace Williams, - - - - - - - Plaintiffs,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that these plaintiffs, Dean Williams and Grace Williams, recover of the defendant, A. H. Carpenter, Sixteen Thousand, Seven Hundred and sixty-nine and 92/100 ($16,769.92) dollars, with interest thereon at the rate of six (6%) per cent per annum, from date of the entry of this judgment, until paid, and their costs herein.

It is further hereby Ordered and Adjudged that the transfer of eighty-two (82) shares of stock in the South Central Petroleum Corp., from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the corporation on or about July 16, 1949, was and is a fraudulent transfer of this stock to her in violation of Kentucky Re-

vised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered and Adjudged.

(s) H. Church Ford, Judge,
United States District Court for
the Eastern District of Kentucky
at Lexington.

Entered: January 12, 1960.

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1076

Raymond R. Calvert, - - - - - Plaintiff,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - Defendants.

JUDGMENT.

The above styled cause, having been heard by the Court upon the pleadings, exhibits and evidence adduced, without the intervention of a jury; and the Court having filed an opinion setting out Findings Of Fact And Conclusions Of Law, in conformity with which it is now and hereby Ordered and Adjudged that the plaintiff, Raymond R. Calvert, recover of the defendant, A. H. Carpenter, Thirty Thousand and fifty-nine and 08/100 ($30,059.08) dollars, with interest thereon at the rate of six (6%) per cent per annum, from date of the entry of this judgment, until paid, and his costs herein.

It is further hereby Ordered and Adjudged that the transfer of eight-two (82) shares of stock in the South Central Petroleum Corp., from James F. Frenzel to Margaret L. Carpenter, under a contract dated February 17, 1948, which transfers were made on the books of the corporation on or about July 16, 1949, was and is a fraudulent transfer of this stock to her in violation of Kentucky Re-

vised Statute 378.010 and 378.020; and the transfer is hereby set aside, and it is held to be the property of A. H. Carpenter, and it is so Ordered and Adjudged.

(s) H. Church Ford, Judge,
United States District Court for
the Eastern District of Kentucky,
at Lexington.

Entered: January 12, 1960.

APPENDIX E

UNITED STATES DISTRICT COURT
Eastern District of Kentucky
At Lexington
No. 1037

Richard W. Terrill and
Frances B. Terrill, - - - - - - Plaintiffs,

v.

A. H. Carpenter,
Margaret L. Carpenter,
South Central Petroleum Corp. and
The California Company, - - - - Defendants.

OPINION—Filed August 16, 1956.

By this action, plaintiffs seek to recover their investments, first made early in 1946 and continued from time to time for several years thereafter, in certain oil and gas leases in Kentucky on the ground that they were induced by fraudulent representations of the defendant A. H. Carpenter.

Plaintiffs' investments were in leases of lands located in Estill, Powell, Menifee, Hart and Lee Counties. Many years previous, these counties had been subjected to considerable oil and gas exploration, with some degree of success, by methods of recovery by natural flow or by pumping, which are referred to in the industry as primary recovery methods. According to the testimony of Richard D. White, Division Exploration Superintendent for California Oil Company, who had many years of experience in such matters in Kentucky and elsewhere, "from fifty to forty per cent of the oil in place is left in the ground by

ordinary, primary production methods". (Tr. Ev. p. 1055). Due, no doubt, to the prospects of recovery by deeper drilling and more modern methods, at about the time the plaintiffs invested in this area there was a resurgence of interest in exploration for oil and gas in these Kentucky counties, evidenced by the renewal of explorations by some of the major oil companies and others engaged in the industry.

In 1945 the defendant A. H. Carpenter, a native of Kentucky, who had been actively engaged in exploring for oil in other states, returned to Kentucky and procured leases upon a considerable acreage in the above mentioned counties with a view to engaging in further exploration for oil and gas. After ascertaining from authentic geological reports that the geological structures underlying his leases were favorable, in 1946 he started drilling upon a rather extensive scale. From time to time he sold fractional working interests in leases which he had procured and upon which he was drilling wells. This seems to be a method by which such enterprises are frequently promoted and financed. The mere assignment of a fractional working interest in such a lease, however, does not create the relation of partners or joint adventurers but only that of co-tenants or tenants in common who ordinarily bear no part of the drilling or exploration expenses but are entitled to share proportionately in benefits derived therefrom. Young v. Hill, 247 Ky. 672; Stephens v. Allen, 237 S. W. 2d 72.

The plaintiffs, Dr. Richard W. Terrill, a physician residing at Ft. Wayne, Indiana, and his wife, Mrs. Frances Terrill, were among numerous persons who, from 1946 to 1949, purchased fractional working interests in leases upon which the defendant A. H. Carpenter was engaged in exploring for oil or gas by drilling one or more wells. They also claim to have advanced to Carpenter various sums of money for the purchase of leases in acreage surrounding certain wells.

While denying all charges of fraud, the defendant A. H. Carpenter asserts (1) that due to the long lapse of time since the occurrence of the transactions alleged by plaintiffs, their claims are barred by applicable statutes of limitation, (2) that by a contract of April 10, 1951, entered into between plaintiff Richard W. Terrill and others and the defendant A. H. Carpenter, the parties fully and finally compromised and settled all controversies between them to the date thereof and released all claims against each other, and (3) that by their unequivocal acts and conduct the plaintiffs, with full knowledge of all attendant facts and circumstances, elected to enjoy the benefits of their investments and are, therefore, without right to the remedies herein sought.

We turn first to consideration of defendants' plea based upon the statute of limitation. Section 413.120(12) of the Kentucky Revised Statutes provides that an action for relief or damages on the ground of fraud or mistake shall be commenced within five years after the cause of action accrued, and the section 413.120(3) provides that in an action for such relief, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake.

It is contended on behalf of the defendant that, although the original complaint was filed July 13, 1953, since the substituted complaint, which materially changed the relief sought, was not filed until May 12, 1954, the latter date should be considered as the date of the institution of the action now under consideration in respect to the application of the statutes of limitation. It is made plain in the pleading that the claims asserted by the amended and substituted pleadings arose out of the conduct, transactions and occurrences set forth or attempted to be set forth in the original pleading. Under Rule 15(c) of the Federal Rules of Civil Procedure, the amended and substituted

pleadings relate back to the date of the filing of the original pleading, July 13, 1953.

The Court of Appeals of Kentucky has frequently construed the provisions of the above statutes relating to the five year period of limitation and has uniformly held that if, from the time of the alleged fraud, the five year period is allowed to elapse, the plaintiff must allege and prove that the fraud was not only not discovered within the five year period, but that it could not have been discovered before the lapse of that period by the exercise of reasonable diligence. McCoy v. Arena, 295 Ky. 403, 409; Gragg v. Levi, 183 Ky. 182, 208 S. W. 813, and cases cited; Forman v. Gault, 236 Ky. 213, 32 S. W. 2d 977; House v. Farmers Bank, 269 Ky. 80, 106 S. W. 2d 113.

It appears from the testimony introduced on behalf of the plaintiffs that their investments in the Maloney lease in Powell County and surrounding acreage, in the Logsdon lease in Hart County and surrounding acreage, in the C. C. Frazier lease in Powell County, and their investments in the Pilot area in Powell and Estill Counties, as a whole, and specific investments in leases embraced in the Pilot area, which were the Vanderpool, the Lula Laws, the Spencer and the Nelson leases, and all transactions and occurrences herein relied upon in respect thereto, took place in the years 1946 and 1947. During these years the plaintiffs frequently visited many of the areas in which they had made their investments and observed the progress and results of drilling operations. All the wells drilled upon these leases were completed and the results known long prior to 1948. Failure of Mr. Carpenter to satisfactorily account for any money advanced for the purchase of adjoining acreage, as well as his failure to make any assignments to the plaintiffs for fractional working interests in leases to which they claim they were entitled were matters well known to plaintiffs before 1948.

If any fraud was involved in any of these transactions, the plaintiffs have failed to disclose by proof any facts or circumstances which precluded them from discovering it by the exercise of reasonable diligence before the lapse of the five year period of limitation.

In Gragg v. Levi, et al., 183 Ky. 182, 186, the Court held plaintiffs' claim of mistake was barred for failure to sustain the burden of proof that the mistake was not discovered and could not have been discovered by the exercise of reasonable diligence until within five years before the action was commenced and said: "Statutes of limitation are statutes of repose. Courts lend their aid to the vigilant, not to the slothful. One must act while the evidence covering the transaction is fresh and may be produced. Here one of the parties is dead, hence important evidence is hushed. There could be no better illustration of the reason for the rule and statute, than furnished by the facts of this case."

This comment is especially applicable here for it appears from the record that in practically all of the transactions relied upon by the plaintiffs Joseph F. Shepperd was the active agent or representative of the defendant Carpenter. By his death, which occurred before the institution of this action, we are deprived of testimony as to many of the attendant facts and circumstances.

For the reasons indicated, we conclude that all claims of the plaintiffs resting upon and arising out of the transactions above referred to in 1946 and 1947 are barred by the Kentucky five year statute of limitation.

Moreover, on April 10, 1951, Dr. Terrill, together with other parties having fractional working interests in the so-called Pilot area, which by agreement had been converted into stock of the Mid-South Oil Company, entered into an agreement with the defendant, A. H. Carpenter, and Joseph F. Shepperd (now deceased) whereby, in con-

sideration of the assignment by Carpenter and Shepperd of their stock in the Mid-South Oil Company to the treasury of the company to be thereafter allocated to Dr. Terrill and the other stockholders, and in further consideration that Carpenter and Shepperd release and relinquish certain claims which they held against the corporation, they effected a full and final compromise and settlement of all controversies between them and released all claims against each other. The language in this agreement seems to be clear, explicit and unmistakably applicable to the matters herein complained of in respect to the leases and transactions involving the Pilot area. The language indicates a purpose to make an end of every matter arising under or by virtue of those previous transactions. "If parties intend to leave some things open and unsettled their intent so to do should be made manifest." United States v. Wm. Cramp & Sons Co., 206 U. S. 118, 128; Perkins v. Fourniquet, et al., 55 U. S. (14 How.) 313, 325; St. Louis, etc. Railroad v. United States, 267 U. S. 346, 349. The charge made on behalf of plaintiffs that this agreement was fraudulently procured by Carpenter is without support in the evidence.

In March 1947 Dr. Terrill and other persons owning shares in the leases embraced in the Pilot area joined in incorporating the Mid-South Oil Company and conveyed to it their respective undivided interests in the Pilot area in exchange for the stock of the corporation. Dr. Terrill was not only one of the incorporators but he was also a director of the corporation and is shown to have participated in the meetings by proxy. At that time several of the wells within the Pilot area were producing oil in paying quantities and the obvious purpose of the organization of the corporation was to provide a practical means by which the owners of the undivided interests might receive the benefits to which they were entitled, as well as bear their proportionate part of the expenses of operation. Dr. Terrill and the other shareholders received their proportionate

shares of the proceeds from the oil produced for approximately five years, until the corporation was dissolved and its assets sold for a substantial price. Dr. Terrill served as the representative of the shareholders in making the sale. The charges made on behalf of plaintiffs that this corporation was a fraudulent scheme, a mere dummy to serve the interests and purposes of Carpenter, and had no legal existence seem to be without support by any proof introduced in the case and entirely without merit. So far as the testimony shows, Dr. Terrill's participation in the organization and operation of the corporation was voluntary and without duress or improper persuasion.

This brings us to the consideration of the claims of Dr. Terrill arising from the alleged investments, similar to those made in prior years, but alleged to have been made during the years 1948 and 1949, which are not affected by the five year statutes of limitation.

Jim Hall Well.

It is claimed by Dr. Terrill that on August 24, 1948, he invested $1850 in the Jim Hall well in Powell County, which he sometimes refers to in his testimony as the Hall-Strange well. He gives us no information as to the nature or extent of the interest he claims to have so acquired and admits that he received no assignment or conveyance for any interest therein. He produces a check, dated August 24, 1948, drawn by him on the Lincoln National Bank and Trust Company of Ft. Wayne, Indiana, for the sum of $1850 payable "To the order of Mr. A. H. Carpenter" (Plaintiffs' Exhibit 44). Dr. Terrill testified that he mailed this check to Mr. Carpenter. Mr. Carpenter denies that he received the check or any amount of money on account of it. The check, though payable to his order, bears no endorsement of Mr. Carpenter or any other payee. It merely bears a perforation "Paid 8 24 48 71-27". This was the same

date the check was drawn. Nothing is introduced to show that this check was ever charged to the account of Dr. Terrill by the bank upon which it was drawn. This vague evidence is insufficient to support the claim that Dr. Terrill invested in the Jim Hall well.

Shell Palmer Lease.

The testimony of Dr. Terrill as to his investment in the Shell Palmer lease in Menifee County and as to the representations made to him in respect thereto by Mr. Carpenter is as follows:

"Q. 464. Dr. Terrill, did you make an investment in Menifee County, Kentucky?

A. I did.

Q. 465. On what lease?

A. On the Shell Palmer lease.

Q. 466. Did you have any discussion with Mr. Carpenter before you invested in that lease?

A. I did.

Q. What did he say to you?

A. Mr. Carpenter said that he had wells in The Children's Home area and that they were very productive wells, that a number of people had tried to acquire the Shell Palmer lease which was supposedly adjoining, but Mr. Palmer refused to lease that ground to anybody. Mr. Carpenter said that he was a very unusual character and very difficult to deal with and that he had spent a lot of time and effort in getting what little good will it would be possible to get from Mr. Palmer, but even he could not lease this land as long as Mr. Palmer was alive, but, if anybody was going to get it, he was going to get it. Mr. Carpenter said he finally acquired it when Mr. Shell Palmer got drunk and fell down in the hog pen and the hogs ate him up."

A 5/32 undivided working interest in this Shell Palmer lease, which had previously been assigned by A. H. Carpenter to J. F. Shepperd, was assigned to Richard W. or Frances Terrill by J. F. Shepperd on February 20, 1949. The four wells drilled by Mr. Carpenter on this lease failed to produce either oil or gas in paying quantities and they were abandoned.

Lee County Lease.

It satisfactorily appears from the record that on the 20th day of June, 1949, J. F. Shepperd assigned to R. W. or Frances Terrill 8/64 working interest in 39 leases covering a large body of land located in Northeast Lee County, Kentucky (Plaintiffs' Exhibit 62). This property had previously been conveyed to J. F. Shepperd by the defendant A. H. Carpenter. In respect to the representations made to him by Mr. Carpenter relative to this transaction, Dr. Terrill testified as follows:

"Q. 452. What did Mr. Carpenter say to you about this acreage in Lee County?

A. Mr. Carpenter told me that there was a large plot of acreage in Lee County, between 2500 and 3000 acres, that had excellent geology, that the geology had been worked out by the University of Kentucky geological department, that the leases were expensive and called for a lot of money, that there had never been any drilling on this plot of land and there was a pure wildcat, but the geological report was so excellent that he recommended very highly my investing in this property and he recommended the drilling of two wells.

Q. 453. Did you invest in that property?

A. I did" (Tr. Ev., pp. 196-197).

Under the law of Kentucky, the established doctrine in respect to proof essential to establish actionable fraud is

that it must appear from the proof that the alleged misrepresentations were in respect to matters of *material* fact as distinguished from mere opinion or a promise for the future; were relied upon by the person whose action was intended to be influenced; and were made with knowledge of their falsity or under circumstances which did not justify belief in their truth. Livermore v. Middlesborough Town Lands Co., 106 Ky. 140, 163; Dolle v. Melrose Properties, Inc., 252 Ky. 482; Baxter v. Davis, 252 Ky. 525.

In Engemann v. Allen, Trustee, 201 Ky. 483, 484, the Kentucky Court of Appeals observed "Nothing is more uncertain than the production of oil wells, and any representation as to future production is a mere expression of opinion as to expectations and probabilities, and will not constitute fraud, even though it turn out to be untrue."

There is nothing to show that Dr. Terrill was a novice in respect to such transactions. In response to the question as to whether from the years 1946 to 1950 he had other similar transactions in the oil business, he admitted that, while he did not remember the dates, he had purchased fractional working interests in other oil fields with which the defendant Carpenter had no connection (Tr. Ev., Vol. 6, pp. 2036-2039).

Testing the representations alleged to have been made by Mr. Carpenter in respect to the Shell Palmer lease and Lee County leases by the rule above stated, we are of the opinion that they do not measure up to the standard of actionable fraud and therefore constitute no basis for the claims herein asserted. It is not shown that any of the facts alleged to have been misrepresented were in respect to matters of material fact or that they were either made with knowledge of their falsity or under circumstances which did not justify belief in their truth.

The evidence is insufficient to support the claim of Dr. Terrill that he invested in the gas wells known as the

James Smyth well, the Hood Wise well, the Elbert Wasson well and the Ida Barnes Nicholas well, thus rendering it unnecessary to here discuss the controversy disclosed in the record in respect to the failure of Mr. Carpenter to disclose to investors in those wells the facts as to the quality of gas produced or to the probable size of the field. It appears that such interests as Dr. Terrill acquired in gas wells were conveyed to him by Mr. Carpenter without consideration. Dr. Terrill joined with other persons interested in the gas wells in employing Harry Witt, an engineer residing at Irvine, Ky., to promote the sale of gas produced from these wells. From them, Dr. Terrill and other persons holding interests therein have ever since received the proceeds of gas sold and so far as disclosed by the record are still receiving such proceeds.

It appears that the unequivocal acts and conduct of the plaintiffs, by participation for many years in the benefits derived from the producing oil wells, as well as in the benefits derived from the producing gas wells, with knowledge of the attendant facts and circumstances involved in the transactions, constituted such condonement of the alleged fraud, if any existed, as to preclude the remedies which they now belatedly seek. Mackenzie v. Eschmann's Executors, 174 Ky. 450, 454; Cox v. Higgins, 223 Ky. 510.

Apart from the foregoing considerations, however, viewing the overall record in respect to the various charges of fraud upon which the plaintiffs rely, we are of the opinion that they have failed to sustain the burden of proving their accusations by clear and convincing evidence for, under the law of Kentucky, it is made clear that "fraud will not be presumed, and one who charges fraud assumes the burden of sustaining his accusation by clear and convincing evidence sufficient to overcome the legel presumption of innocence and honesty. Fraud may be proved by positive evidence or circumstances and inferences fairly and rea-

sonably deducible therefrom, but it may not be proved by mere inferences, conjecture, or suspicion, and where the proven facts or circumstances merely show inferences, conjecture, or suspicion, or such as to leave reasonably prudent minds in doubt, it must be regarded as a failure of proof to establish fraud." Goerter v. Shapiro, 254 Ky. 701, 704; Rice v. Hord, 252 Ky. 469, 472; Dennis v. Thompson, et al., 240 Ky. 727, 736.

The foregoing conclusions render it unnecessary to consider or determine the question presented as to whether the purchase and transfer of certain stock in the South Central Petroleum Corporation in the name of Margaret L. Carpenter was in violation of Kentucky Revised Statutes, Sections 378.010-378.020.

Judgment will be entered in conformity with the views herein expressed.

(s) H. Church Ford,
Judge.

August 16, 1956.

ILE COPY

FILED
MAY 5 1961
JAMES R. BROWNING, Clerk

No. 889

IN THE

Supreme Court of the United States

October Term, 1960

A. H. CARPENTER, ET AL
Petitioners
VS:
WAYNE R. GLOCK, ET AL
Respondents

A. H. CARPENTER, ET AL
Petitioners
VS:
H. F. GARTON
Respondent

A. H. CARPENTER, ET AL
Petitioners
VS:
G. A. McDOWELL, ET AL
Respondents

A. H. CARPENTER, ET AL
Petitioners
VS:
DEAN WILLIAMS, ET AL
Respondents

A. H. CARPENTER, ET AL
Petitioners
VS:
CLAUDE C. JOHNSON
Respondent

A. H. CARPENTER, ET AL
Petitioners
VS:
R. R. CALVERT, ET AL
Respondents

A. H. CARPENTER, ET AL
Petitioners
VS:
ROBERT E. JOHNSON
Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

TROY D. SAVAGE
Frankfort, Kentucky

HERBERT D. SLEDD
WILLIAM H. McCANN
Lexington, Kentucky

Attorneys For Respondents

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VS:
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Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

PETITIONERS FAILED TO BRING THEMSELVES UNDER U.S.S.Ct. RULE 19b

The petitioners have not brought themselves under Rule 19b of this Court.

A.

STATEMENT OF RULE 19b

Rule 19b says that this Court will entertain and grant a writ

of certiorari where a Court of Appeals has rendered a decision or decided an important state question in a way in conflict with applicable state law.

All the other reasons mentioned in 19b for granting a petition for writ of certiorari have no application to the present case.

B.

STATEMENT OF ISSUES INVOLVED

The District Court for the Eastern District of Kentucky in no way failed or decided any issue in conflict with applicable law for the State of Kentucky, either statutory or case law.

The questions presented by the pleadings in the District Court were as follows:

(1) Fraud and deceit in the inducement of the sale of fractional working interest in gas leases;

(2) The fradulent transfer of one-fourth of the stock in the South Central Corporation to Margaret Carpenter, wife of petitioner A. H. Carpenter;

(3) Statute of limitations;

(4) Measure of damages;

(5) Amount of damages.

Another question was raised by the present petitioner in his brief to the U.S. Circuit Court at Cincinnati, to wit: The actions involved in the District Court were really rescission actions instead of common law actions for damages.

Another question or theory was raised by present petitioners' petition for a rehearing in the U.S. Circuit Court at Cincinnati as follows:

That the District Court ruling was a taking of property without due process of law.

C.

THE DISTRICT COURT'S RULING APPLIED THE APPLICABLE LAW OF THE STATE OF KENTUCKY TO ALL OF THE ABOVE ISSUES.

ISSUE 1

Question (1) above was not carried forward into this petition for a writ of certiorari by any arguments in support thereof, except as to the Hall and Wells leases (VIII, p. 21, petition), where the petitioner says there was no proof of any representation concerning these wells. This is simply not so. The record shows that the *"Receipt and Agreement"* given for the money paid for the interest in these leases recited that these two leases were in the "Furnace Area" (App. Vol. II, pp. 366a, 424a, 471a, 509a and 508a).

All representations concerning the leases in the "Furnace Area" applies to the Hall and Wells leases, as well as the Smyth, Wise, Wasson, Burnes and other leases sold as gas leases, although the latter were closer to the site of an old stone furnace, from which the area took its name.

ISSUE 2

This issue is not mentioned in the petition for writ, and may be disregarded.

ISSUE 3

The ruling of the District Court on question No. (3) above follows the Kentucky statute and cases applicable to the statute of limitations in Kentucky.

The Court applied the law on limitations as set out in KRS 413.120 and KRS 413-.130. The wording of both statutes is set

out in the petition for writ of certiorari at page 7. The Kentucky cases interpreting this section, insofar as applicable to the facts of the instant case, are: Shilling v. McGraw, 298 Ky. 783, 184 SW 2d 97; Dycus v. Dycus, 295 Ky. 847, 175 SW 2d 997; McCoy v. Arena, 295 Ky. 403, 174 SW 2d 726.

A misstatement of the evidence is made in the petition for rehearing at page 11 as follows:

> ". . . after respondents learned of the true analysis of the gas, which was in December 1948 and the first days of January 1949 . . . ."

This is an incorrect statement of the evidence. The evidence is that the plaintiffs below, R. R. Calvert, did not discover or learn of the true analysis of the gas until about the month of March or April, 1949 (App. V. II, p. 434a), and Dean Williams not until the year 1950 (V. II, p. 609a), which of course brings all of these plaintiffs well within the five-year period of limitations for the bringing of fraud actions from the date of discovery of the fraud, and the District Court so ruled.

ISSUE 4

The Kentucky law was followed in deciding question No. (4) above set out regarding the measure of damages to be applied to actions in deceit for damages.

The Court followed the rule set out in the case of Sanders v. Chesmotel Lodge, Ky., 300 SW 2d 239. See page 41 of petition for writ of certiorari.

In this case the Court of Appeals for the State of Kentucky adopted the rule for measuring damages in actions of this kind as set out in A Restatement Of The Law Of Torts, V. III, page 549, and this is unquestionably the law of the State of

Kentucky.

As can be seen by reading this rule as enunciated in the Sanders v. Chesmotel Lodge case, the "out-of-pocket-loss" rule is adopted in the State of Kentucky for measuring damages in fraud cases. This, simply stated, is the difference between what is paid and its value, or the difference between what was paid and what was gotten, and of necessity requires a pleading and proof of the purchase price of the thing bought.

The petitioner argues in points IX, X, and XI that the Court misapplied the law of the State of Kentucky and makes arguments based upon what is known as the "benefit of the bargain" rule.

This is assuming a wholly fallacious, original premise and therefore the conclusions must, of necessity, be wrong. The "benefit of the bargain" rule is not followed in the State of Kentucky. This rule, simply stated, is as follows: The difference between what the purchaser got and what it would have been worth had the representations been true. Under this rule the question of the purchase price need not be pled or proven. For a discussion of the two rules for measuring damages see 24 Am. Jur., Fraud and Deceit, Sec. 227 and Sec. 228, at pages 55-60.

ISSUE 5

Question No. (5) is not argued before this Court, that is, as to the amount of damages, except insofar as the petitioners argue that the Court of Appeals applied the wrong measure answered above (Issue 4), and possibly except insofar as they argue that the Court did not allow the petitioner a sufficient amount as the value of the property received.

The District Court held that the proof showed that the leases were of little or no commercial value (p. 36 of petition for writ of certiorari). The District Court ruled as follows:

"By 1954 the rock pressure of the gas wells had declined considerably and has continued to decline rapidly. On February 9, 1958, the pressure of the James Smyth well was 110 pounds, the Hood Wise 70 pounds and the Elbert Wasson 65 pounds. The leases in which plaintiffs invested have little or no commercial value."

As stated in the petitioner's petition (p. 26), the original rock pressure of these wells was 772 pounds, and there is ample evidence in the record to support the Court's finding, as there are three expert witnesses who testified that the wells were valueless (App. V. III, p. 1082a; V. VI, pp. 1088a, 1093a). Furthermore, there is evidence that the income had ceased.

ISSUE 6

On question No. (7) raised by the appellants in their brief to the U.S. Circuit Court, but which had not been raised in the pleadings or trial before the District Court, the District Court properly applied the Kentucky law. The gist of the argument made by the present petitioners in the U.S. Circuit Court was that even though the actions had been styled, tried and ruled upon by the District Court as common law actions for damages for deceit, they were in reality actions for rescissions as the complaints asked for the exact amount of the purchase price as damages and it made no difference what the complainants called the actions.

In Kentucky the general law is followed as pertains to actions for rescission and actions for damages, and was so applied by the District Court in these cases.

The law in Kentucky applicable to waiver of rights of actions for fraud by the ratification of a contract after knowledge of fraud is as follows:

(1) It is that the ratification of such a contract, after ac-

quiring knowledge of the fraud by accepting benefits of the contract, treating as in force, etc., waives all rights to an equitable action for rescission of the contract and recovery of the purchase money. 24 Am. Jur. 36, Sec. 210; McCulloch v. Scott, 13 B. Monroe, Ky. 172; Webb v. Verkamp Corporation, Ky., 254 SW 2d 717. The reason for this rule being that one cannot treat a contract as in force and at the same time seek to rescind same.

(2) It is likewise the Kentucky law that ratification after discovery of fraud does not waive the right to bring a common law action for damages for the loss occasioned by the fraud. 24 Am. Jur. 40, Sec. 213; Dunn v. Tate, Ky., 268 SW 2d 925; Kentucky Electric Development Co. v. Head, Ky., 68 SW 2d 1.

(3) This latter rule is subject to an exception that one cannot make a new contract, alter or modify the original fraudulent contract after acquiring knowledge of the fraud without waiving the fraud and losing the right to sue in either equity for rescission or common law for damages. 24 Am. Jur. 42, Sec. 214; Hampton v. Suter, Ky., 330 SW 2d 402.

A point is attempted by petitioner that the Hampton v. Suter, supra, case overrules the case of Dunn v. Tate, supra. However, this is untenable because the Court in the Suter case specifically points out that it does not overrule the Dunn case as follows:

> "Having once determined such an election he could not thereafter be relieved of the obligations placed upon him by the terms of the contract, *although such an election does not ordinarily deprive one of a right to claim damages. Dunn v. Tate, Ky.*, 268 SW 2d 925." (Emphasis added)

ISSUE 7

The theory or issue raised by the present petitioners in their

petition for a rehearing in the U.S. Circuit Court, i. e., that the ruling of the District Court was a taking of the property of the petitioners without due process of law, is hard to understand.

Due process of law, as we understand it, is a ruling by a judicial tribunal who has jurisdiction of the subject matter of the parties involved, and can in no sense be regarded as the taking of property without due process of law. Due process of law means a judicial determination, which was exactly what happened in the instant case, if there was any taking at all. The authorities cited by the petitioners have nothing to do with the issue presented as they are merely statements that property cannot be taken without due process of law, which is a court action.

Assuming that the Court did err in failing to allow the present petitioners some setoff for the alleged value of the property which was received by the purchasers, it would be a mere error in the Court's judgment which would be appealable and in no sense could be construed as the taking of property without due process of law.

D.

THE R. W. TERRILL VS: A. H. CARPENTER CASE HAS NO APPLICATION TO THE PRESENT CASE

An argument is made at page 19 of the petition for writ of certiorari that the District Court was controlled by the case of R. W. Terrill v. A. H. Carpenter, et al, which was appealed to the U.S. District Court and affirmed that the ruling in the Terrill case on the question of the signatures of the plaintiffs in the present cases, Dr. G. A. McDowell and Dr. H. F. Garton, is res adjudicata, or at least binding on both the District Court and the Circuit Court in these cases. A copy of the District Court's ruling in the Terrill case is included in the appendix to the

present petition (pp. 57-68), and a cursory reading of the District Court's ruling at page 62 of the petition shows that the release signed by Dr. Terrill, Dr. McDowell and others was a release of the claims involved in the operations in the "Pilot Area," while the litigation in the present cases involves the transactions in and around the "Furnace Area." Two wholly separate and distinct areas, one involving oil leases and the other gas leases.

We do not see the effect of the petitioner's argument for both the Terrill case and the present cases were decided by the same District Court and the same U.S. Circuit Court, and if the decision in the latter cases are contra to the decision in the Terrill case it can mean only one thing: That the Court is overruling its former opinions.

However, the opinion of the District Court in these seven cases is not controlled in any way by the opinion in the Terrill case because the Terrill case involves alleged fraud in the inducement of the purchase of fractional interest in producing oil leases. It involves separate and distinct plaintiffs and separate and distinct ground of fraud. The question of fraud in the inducement of the purchase of fractional working interest in gas leases in the "Furnace Area" was specifically excluded from the opinion in the Terrill case at page 66 of the petition as follows:

> "The evidence is insufficient to support the claim of Dr. Terrill that he invested in the gas wells known as the James Smyth well, the Hood Wise well, the Elbert Wasson well and the Ida Barnes Nicholas well, thus rendering it unnecessary to here discuss the controversy disclosed in the record in respect to the failure of Mr. Carpenter to disclose to investors in those wells the facts as to the quality of gas produced or to the probable size of the field."

The rule in the Terrill case as pertained to the statute of limitations has nothing to do with the issue on the statute of limitations in the present cases because the ruling in the Terrill case was that the statute of limitations had run against money fraudulently parted with in the year 1947, which made the filing of the Terrill action in July of 1953 well beyond the five-year limitation. The fact that in the year of 1949 Dr. Terrill invested money in other oil leases was not ruled out on the ground that limitations had run against Dr. Terrill but on the ground that plaintiffs had failed to establish fraud in the original inducements in respect to these investments.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Troy D. Savage

TROY D. SAVAGE

HERBERT D. SLEDD

WILLIAM H. MCCANN

Attorneys For Respondents

CERTIFICATE

I, Astor Hogg, do hereby certify that I am a member of the United States Supreme Court Bar, having been admitted according to law, and further certify that Troy D. Savage, whose name appears on the foregoing response to petition for writ of certiorari, is a member of the Bar of the Commonwealth of Kentucky and in good standing.

ASTOR HOGG

Subscribed and sworn to before me this ..... day of May, 1961, by Astor Hogg.

My commission expires:
February 17, 1964.

LUCY PRATT RODMAN, Notary Public
Kentucky State at Large

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No. 889

Office-Supreme Court, U.S.
FILED
MAY 10 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

A. H. CARPENTER, ET AL., PETITIONERS,
V.
WAYNE R. GLOCK, ET AL., RESPONDENTS.
A. H. CARPENTER, ET AL., PETITIONERS,
V.
G. A. McDOWELL, ET AL., RESPONDENTS.
A. H. CARPENTER, ET AL., PETITIONERS,
V.
CLAUDE C. JOHNSON, RESPONDENT.
A. H. CARPENTER, ET AL., PETITIONERS,
V.
ROBERT E. JOHNSON, RESPONDENT.
A. H. CARPENTER, ET AL., PETITIONERS,
V.
H. F. GARTON, RESPONDENT.
A. H. CARPENTER, ET AL., PETITIONERS,
V.
DEAN WILLIAMS, ET AL., RESPONDENTS.
A. H. CARPENTER, ET AL., PETITIONERS,
V.
R. R. CALVERT, ET AL., RESPONDENTS.

REPLY TO THE RESPONSE

THOMAS D. SHUMATE,
SHUMATE & SHUMATE,
Irvine, Kentucky

M. A. ROWADY,
Winchester, Kentucky

REPLY TO THE RESPONSE

MAY IT PLEASE THE COURT:

In regard to the statement in our petition on page 11 and the response on page 4 in regard to the Statute of Limitations as applied to Dr. R. R. Calvert and Dean Williams that they knew of the true analysis of the gas over five years prior to the institution of their actions, Dr. R. R. Calvert testified that his brother, Dale Preston Calvert, an attorney, was investigating the matter for him (Appellants" Appendix, Vol. II, 434a), and Dale Preston Calvert testified that he learned of the true analysis of the gas in January 1949 (Appellants' Appendix, Vol. II, 632-633a).

As to Dean Williams, it appears that Dale Preston Calvert was investigating for the entire Lafayette group, and Dean Williams was one of the group. In other words, Dale Preston Calvert was their agent looking after their investments, and notice to him was notice to the principals. Neither Dr. Calvert nor Mr. Williams testified as to

any diligence to ascertain the true facts except through Dale Preston Calvert.

Respectfully submitted,

THOMAS D. SHUMATE,
SHUMATE & SHUMATE,
Irvine, Kentucky

M. A. ROWADY,
Winchester, Kentucky.

Attorneys for Petitioners.